

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
No.

ATTORNEY GENERAL,
Plaintiff,

V.

DEPARTMENT OF TELECOMMUNICATIONS
AND ENERGY,
Defendant.

PETITION FOR APPEAL

Introduction

1. This appeal involves a decision on consolidated proceedings filed by the gas and electric divisions of the Fitchburg Gas & Electric Light Company (“Fitchburg” or “Company”). On September 7, 2006, the Massachusetts Department of Telecommunications and Energy (“Department”) issued an order in docket D.T.E. 05-GAF-P4 / 06-28 (“Order”), and permitted the Company to change the cost calculation formula of two reconciling tariffs without conducting a hearing for Fitchburg and without determining whether the resulting, higher rates were just and reasonable. The Department permitted the Company to alter its Cost of Gas Adjustment (“CGA”) formula for the gas company and Default Service formula for the electric company to permit recovery of all of the Company’s energy supply-related bad debt expense. The previous formulas, approved by the Department, permitted the Company to collect only a portion of these expenses from customers while the Company paid for the rest.

2. The Attorney General of the Commonwealth (“Attorney General”) participated in D.T.E. 05-GAF-P4 / 06-28, and now appeals from the Order and asks that it be set aside because it is based on errors of law and regulation, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise unlawful.

Jurisdiction

3. The Supreme Judicial Court for Suffolk County has jurisdiction over the subject matter of this action and authority to order the relief requested pursuant to G. L. c. 25, § 5.

Parties

4. The Attorney General is the chief law enforcement officer of the Commonwealth and pursuant to G. L. c. 12, § 11E, is specifically authorized to intervene in administrative or judicial proceedings on behalf of consumers in connection with any matter involving the rates, prices or tariffs of an electric, gas, telephone or telegraph company doing business in the Commonwealth and subject to the jurisdiction of the Department. The offices of the Attorney General are located at One Ashburton Place, Boston, Massachusetts 02108.
5. The Department is an agency of the Commonwealth, established pursuant to G. L. c. 25, § 1, having its offices at One South Station, Boston, Massachusetts 02110.

Procedural Background

6. On December 15, 2005, Fitchburg filed with the Department a three-part request related to its gas cost recovery tariff. First, it sought approval of price changes for an energy conservation charge. Second, it requested dollar-for-dollar recovery of all gas cost-related bad debt on a going-forward basis effective January 1, 2006. Third, Fitchburg sought recovery of all gas cost-related bad debts for calendar year 2005. Fitchburg proposed to accomplish the second and third requests through changes to its CGA tariff formula.
7. On December 22, 2005, the Department “stamp” approved Fitchburg’s December 15, 2005, filing. The entire written decision for the “stamp” approval consists of all five Commissioners at the Department signing the first sheet of the Company’s tariff filing in a dated block stamped on the page. A copy of this approval is attached to this petition as Exhibit A.
8. On February 3, 2006, the Department issued a Request for Comment on the December 15, 2005, gas filing. The Department asked two specific briefing questions. First, it asked the parties to address the applicability of *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625 (2004), to the Company’s proposal. Second, the Department asked whether the CGA reconciling mechanism permits recovery of costs resulting from a new method for calculating costs on a retroactive basis. Finally, the Department solicited “general comments on the Company’s proposal.”

9. The Attorney General submitted comments on February 21, 2006, and argued that the Department could not approve changes to the Company's reconciling tariff formula without a noticed hearing before the Department to set just and reasonable rates. G. L. c. 164, § 94; *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625, 638 (2004); *Consumers Organization For Fair Energy Equity, Inc. v. D.P.U.*, 368 Mass. 599, 604, 605-606 (1975). The Attorney General also objected to any recovery of costs on a retroactive basis. *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. at 637. Fitchburg filed comments supporting its request, and argued that its proposals complied with Department orders recently issued for other gas companies. No other parties filed comments.
10. On March 7, 2006, the Company filed a request to change the formula of a different reconciling tariff to recover actual electric supply-related bad debt in its Default Service tariff on a going-forward basis, as well as recover actual electric supply-related bad debt for calendar year 2005.
11. On March 21, 2006, the Department issued a Request for Comment on the electric company filing. Like the gas case, the Department asked two specific briefing questions. First, it asked the parties to address the applicability of *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625 (2004), to the Company's proposal. Second, the Department asked whether the Default Service tariff's reconciling mechanism permits recovery of costs resulting from a new method for

calculating costs on a retroactive basis. Finally, the Department solicited “general comments on the Company’s proposal.”

12. The Attorney General submitted comments on April 7, 2006, and, as in the gas case, argued that the Department could not approve changes to the Company’s reconciling tariff formula without a noticed hearing to set just and reasonable rates. G. L. c. 164, § 94; *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625, 638 (2004); *Consumers Organization For Fair Energy Equity, Inc. v. D.P.U.*, 368 Mass. 599, 604, 605-606 (1975); 220 C.M.R. § 11.04 (10)(e). The Attorney General again objected to any recovery of costs on a retroactive basis. *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. at 637. Fitchburg filed comments supporting its request, and argued that its proposals complied with recent Department orders issued for gas companies. No other parties filed comments.
13. Citing a similarity between the two dockets, the Department consolidated the cases on April 7, 2006.
14. The Department did not conduct any public or evidentiary hearings, and did not convene a procedural conference or issue a discovery order setting a timetable for the proceeding or ground rules for the conduct of parties to the case. The Department did, however, ask the Company nine informational requests, which the Company answered.

15. On September 7, 2006, the Department issued its final order granting the Company's request to modify both the CGA and the Default Service tariff formulas to recover actual supply-related bad debt expense retroactive to December 1, 2005, and also on a going forward basis. The Department, however, denied recovery of additional bad debt expense prior to December 1, 2005.

Legal Claims

16. The Court should set aside the Order because it is based on errors of law and regulation, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise unlawful:

a) The Department did not hold a public hearing under G. L. c. 164, § 94, after receiving the proposed changes to Fitchburg's reconciling tariff formulas that generally increased rates for customers. *Consumers Organization For Fair Energy Equity, Inc. v. D.P.U.*, 368 Mass. 599, 604, 605-606 (1975); *Fitchburg Gas and Electric Light Co. v. Department of Telecommunications and Energy*, 440 Mass. 625, 638 (2004); G. L. c. 30A, §§ 10, 11(3)&(4); 220 C.M.R. § 11.04 (10)(e).

b) The Department cannot hold a hearing for one utility and later use that hearing to satisfy the hearing requirement for another utility's request. G. L. c. 164, § 94 ("Whenever the department receives notice of any changes proposed to be made in any schedule . . . [it] shall *thereafter* hold a public hearing . . .") (emphasis added).

c) The Department did not order Fitchburg to publish notice to Fitchburg's customers regarding the change in tariff formulas that raised rates under G. L. c. 164, § 94, and therefore denied those customers due process.

d) The Department failed to engage in reasoned decision making when it modified the formula of a reconciling tariff that increased rates by using a "stamp" approval that neither contains an adequate

statement of reasons nor constitutes a final Department order. G. L. c. 30A, §11(8); 220 C.M.R. §§ 1.12 & 1.13.

e) The Department failed to make necessary findings as to the propriety of rates from the changes to the tariffs. G. L. c. 164, § 94.

f) The Department engaged in retroactive rate making by allowing a change in the formula of a reconciling tariff to collected expenses starting December 1, 2005.

Prayer for Relief

WHEREFORE, the Attorney General requests that this Honorable Court:

1. Set aside the Order of the Department and declare its method of modifying the CGA and Default Service tariffs unlawful;
2. Order refunds of any bad debt expenses collected through the reconciling tariffs in excess of the amounts that would have been collected if the Department had not inappropriately modified the tariffs;
3. Order the Department to conduct an investigation, including discovery, adjudicatory hearings and briefs, to set just reasonable rates in conjunction with the proposed tariff revisions; and
4. Grant such other relief as the Court deems necessary and proper.

Respectfully submitted,

Thomas F. Reilly
Attorney General

By:

Joseph W. Rogers, BBO# 425330
Alexander J. Cochis, BBO# 566910
Assistant Attorneys General
Utilities Division
Public Protection Bureau
One Ashburton Place
Boston, MA 02114

Dated: September 27, 2006

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
before the
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Fitchburg Gas & Electric Light Co.
D/b/a Unitil

D.T.E. 05-GAF-P4 / 06-28

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Boston this September 27, 2006.

Alexander J. Cochis
Assistant Attorney General
Utilities Division
One Ashburton Place
Boston, MA 02108
(617) 727-2200 x. 2406

